UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CR 08-19S**
	:	
RAFAEL O. GUZMAN	:	

DEFENDANT'S MOTION TO SUPPRESS

Now comes the defendant, by and through counsel, and hereby moves to suppress all evidence seized by members of law enforcement in this matter. As grounds, defendant avers that said evidence was seized in violation of the Fourth Amendment of the United States Constitution. A memorandum of law in support of this motion is attached hereto.

Respectfully submitted
Rafael Guzman
By his attorney,

/s/ John E. MacDonald

John E. MacDonald, 5368
LAROCHELLE & MACDONALD, INC.
One Turks Head Place, Suite 1440
Providence, Rhode Island 02903
(401) 421-1440
(401) 421-1442 (FAX)

CERTIFICATION

I hereby certify that on April 21, 2008 a true copy of this document was delivered electronically using the CM/ECF system which will send notification to A.U.S.A. Sandra Beckner.

/s/ John E. MacDonald

John E. MacDonald, Esq.
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

FACTS

On December 7, 2007, a single affidavit in support of a search warrant for a Blue 1998 Dodge Durango, bearing RI Registration 727-400, and a search warrant for the residence at 74 Leonard Jenard Drive, Pawtucket, Rhode Island, was presented to a Magistrate Joseph Ippolito of the Sixth Division District Court. *See* attached search warrants. The affidavit relied on information from "several confidential sources" that the vehicle identified in the warrant was being utilized for the transportation of narcotics and proceeds from the sale of narcotics, and that the defendant, Rafael Guzman was involved in a "cocaine trafficking organization." The affidavit also relied on information regarding a different Dodge Durango, which had been involved in a September 2007 motor vehicle stop where drugs had been seized and the registered owner arrested. That vehicle was released to Mr. Guzman, although he had no apparent involvement in the stop, seizure or arrest. Based solely on information from confidential sources, the affidavit alleged that Mr. Guzman travels to New York once every two weeks to pick up 10-15 kilograms of cocaine and that he has been present at addresses suspected of being used for drug activity. The affidavit notes that a controlled drug buy was executed at 74 Leonard Jenard Drive, Pawtucket, Rhode Island at the direction of DEA agents and the Pawtucket Police between a confidential source and Mr. Guzman sometime between November 1, 2007 and December 7, 2007. There is no information in the affidavit indicating that 74 Leonard Jenard Drive was being utilized for drug storage or any drug activity other than the controlled buy. The only additional information regarding this address is statement that this address is Mr. Guzman's residence. There is no independent corroboration of this statement.

The search warrant affidavit contains information from an un-credited source alleging that Mr. Guzman may be traveling to New York during the first week of December to purchase cocaine. On December 7, 2007, officers from the Drug Enforcement Agency and Pawtucket Police Department, placed under surveillance the 1998 Dodge Durango bearing RI Registration 727-400 driven by Mr. Guzman. Surveillance of Mr. Guzman was maintained during his travel to New York City where he stayed for a period of 90 minutes before traveling northbound on Interstate Route 95. Nothing is included in the affidavit on Mr. Guzman's activities during the 90 minutes he spent in New York such as where he went or how long he stayed.

As Mr. Guzman was still traveling back from New York, northbound on Interstate Route 95, officers conducted a motor vehicle stop. Mr. Guzman and his passenger were immediately detained and the vehicle was transported to the Hopkinton Police Department. A search of the vehicle was conducted at the station, at which time Mr. Guzman was advised of his rights, advised of the existence of the search warrant for his vehicle, and asked if he would cooperate in the search. According to police reports, Mr. Guzman agreed to cooperate and acknowledged that a secret compartment in the vehicle contained cocaine and marijuana. Mr. Guzman tried to show the officers how to operate the secret compartments, but could not get them to function. The officers eventually forced open the compartments and located a quantity of marijuana, cocaine, a handgun and ammunition in clip, as well as a quantity of marijuana behind the vehicle front seat,

$3,154.00 in cash from Mr. Guzman's person and vehicle paperwork in Mr. Guzman's name. Coincident to the stop of Mr. Guzman's vehicle, 72 Leonard Jenard Drive was searched by Pawtucket Police. That search resulted in the seizure of a digital scale, paperwork in the name of Rafael Guzman, a box of 47 Winchester Luger 9mm rounds, a cellular telephone, a box of plastic sandwich bags, and prescription bottles in Guzman's name.

Mr. Guzman was charged with possession with intent to distribute 500 grams or more of cocaine, possessing a firearm after a felony conviction, and possessing a firearm in furtherance of a drug trafficking crime. This motion followed.

ARGUMENT

I. ALL EVIDENCE SEIZED FROM THE 1998 DODGE DURANGO SHOULD BE SUPPRESSED AS THE FRUITS OF AN ILLEGAL SEARCH AND SEIZURE.

A. THE SEARCH WARRANT AFFIDAVIT RELIES SUBSTANTIALLY ON CONFIDENTIAL INFORMANTS WITHOUT ANY DEMONSTRATED VERACITY, RELIABLITY OR BASIS OF KNOWLEDGE, AND THEREFORE DOES NOT DEMONSTRATE PROBABLE CAUSE TO JUSTIFY A SEARCH WARRANT FOR THE 1998 DODGE DURANGO.

A search warrant is required to be supported by oath or affirmation, must particularly describe the place to be searched and the persons or things to be seized, and may be issued only with probable cause. *See U.S. Const Amend. IV*. Furthermore, under the Fourth Amendment, any search or seizure not conducted pursuant to a valid search warrant is per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967); *Kyllo v. United States*, 533 U.S. 27, 41 (2001). Whether a search warrant is supported by probable cause is determined under the totality of circumstances and exists if, "given all the circumstances set forth in the affidavit ... including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 296, (1983). Where this standard was established in the case of confidential informants providing information about narcotics in a home, the court held that, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were"… Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' or, as in this case, by an unidentified informant." *Id*. at 240, *(*quoting *Johnson v. United States*, 333 U.S. 10, 17 (1948)).

In this case, the affidavit contains no information concerning the veracity, reliability or basis of knowledge of the informant or informants. The affidavit is silent regarding the number of informants, or which informant provided what information. Instead, there are assertions that Mr. Guzman is part of a cocaine trafficking organization, that the Dodge Durangos were being used to transport drugs, that certain addresses were being used to store and distribute drugs, that Mr. Guzman would travel regularly to New York for the purpose of purchasing drugs, and that he may travel to New York during the first week of December to purchase cocaine. None of these assertions, however, is supported by evidence showing that the informants were reliable or that their information had led to prior arrests and/or convictions for drug offenses. The affidavit offers no factual foundation to show that any informant had a basis of knowledge underlying their allegations, and includes only a single showing by police, the surveillance of Mr. Guzman's travel to New York, that their investigation independently corroborated any informant's claims.

In the case of a previously reliable informant providing information about cocaine distribution from a hotel room, the court noted, “we have upheld the validity of the probable cause affidavit where the confidential informant had provided information that had proven to be truthful and reliable in the past and where the level of detail showed that the informant was unlikely to lie because the lies would be discovered in short order”, *United States v. Brundidge,* 170 F.3d 1350, 1354 (11th Circ. 1999). Similarly, in a case where “history had proven the [confidential informant] to have previously given reliable information to law enforcement which led to numerous seizures of drugs, money, and the arrests of those responsible,” there was found to be a clear indicia of reliability. *United States v. Custis*, 786 F.Supp. 533, 538 (D.Md. 1992). However, in the case at bar, the information provided by informants to the affidavit is entirely unsupported by similar histories of reliability or bases of the informants’ knowledge. Thus the affidavit is defective in this regard.

In finding a basis for probable cause to support a warrant, the issuing magistrate may look beyond an informant’s credibility and the basis for that informant’s knowledge, using a flexible, “common sense” analysis of the totality of the circumstances in a case. *Illinois v. Gates*, 462 U.S. at 214. This consideration includes an analysis of whether an informant’s otherwise unsupported information could be corroborated by police and to what extent independent investigation by the police provides basis for probable cause. *Id*. For example, in the case of an anonymous telephone tip, police sought to verify, through surveillance, whether the informant's predictive information relating to criminal activity was independently confirmed. *See United States v. Hauk*, 412 F.3d 1179, 1188 (10th Cir.2005) (“By corroborating predictive information in an anonymous tip, police officers test the informant's knowledge and credibility, getting some assurance that the tip is reliable”). Indeed, “[w]hen there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant." *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000).

In this case, police did undertake surveillance of Mr. Guzman in order to corroborate part of the confidential informant's prediction that Mr. Guzman "may" be traveling to New York City to purchase cocaine. However the informant's assertion that the purpose of that trip was to purchase cocaine remains unsupported by any corroboration by police demonstrating probable cause to believe that cocaine was in the car. Nor was there any specificity as to where in New York City Mr. Guzman would be traveling, what vehicle would be used or what amount of cocaine would be purchased. Further, the affidavit's description of the vehicle "staying in NY City for approx 90 minutes" is lacking in any detail as to whether Mr. Guzman stopped at any location(s), how long he stayed and other surveillance details corroborating an alleged drug pick up.

In sum, the affidavit contains mere conclusions of drug dealing without any basis of knowledge, any indication of past reliability or any veracity on the part of the informant(s), or any independent corroboration to justify a search warrant of the defendant's vehicle.

B. THE CONTROLLED BUY BETWEEN A CONFIDENTIAL INFORMANT AND THE DEFENDANT ALONG WITH THE PREVIOUS STOP OF ANOTHER DODGE DURANGO PROVIDES NO BASIS FOR PROBABLE CAUSE JUSTIFYING A WARRANT TO SEARCH THE 1998 DODGE DURANGO.

To justify a search, circumstances set forth in search warrant affidavit must indicate a nexus between evidence of illegal activity and the particular place to be searched. *U.S. Const. Amend IV*. In this case, the controlled buy between Mr. Guzman and a confidential informant represents the only independent information offered by police in the warrant affidavit that Mr. Guzman is involved in drug activity. However, there is no connection between this incident and the 1998 Dodge Durango, or to the uncorroborated assertions of trips to New York. Additionally, the information in the affidavit that a green Dodge Durango, bearing Rhode Island registration 756-416, was involved in a motor vehicle stop in Maine where drugs were seized and was ultimately released to Rafael Guzman. As the affidavit contains no information that this vehicle was being operated by Mr. Guzman at the time of the Maine stop, that he was present at that stop, or that he was arrested incident to the stop, and because it is not the same vehicle for which the warrant was issued, there are no facts in the affidavit that connect Mr. Guzman to a Dodge Durango actually implicated in the transportation of drugs.

Courts have generally required that a specific factual connection exist between the target location and the reported illegal activity for a sufficient nexus to be found. See *United States v. Rosario,* 918 F.Supp. 524, 528 (D.R.I.1996) (opinion of DEA special agent based upon her knowledge of behavior and practices of narcotics deals could not, by itself, furnish nexus between criminal activity and place to be searched); *United States v. Rios*, 881 F. Supp. 772, 775 (D.Conn. 1995) (agent's expert opinion does not, standing alone, establish nexus); *United States v. Gomez,* 652 F.Supp. 461, 463 (E.D.N.Y.1987) (same); *United States v. Kenney,* 595 F.Supp. 1453, 1461 (D.Me.1984) (mere statement in affidavit that suspect had committed drug crime not enough to establish nexus to residence); *State v. Loomis,* 111 Wash.App. 1038, (holding that a controlled buy conducted in a location other than the defendant’s residence did not establish a nexus for a warrant of the defendant’s home). Therefore, without any nexus between the controlled buy and the place to be searched, the 1998 Dodge Durango, or between the green Dodge

Durango involved in the Maine drug seizure and the 1998 Dodge Durango specified in the warrant, neither circumstance provides basis in the affidavit for a finding of probable cause to support a warrant.

C. THE LEON GOOD FAITH EXCEPTION DOES NOT APPLY BECAUSE THE MAGISTRATE'S PROBABLE-CAUSE DETERMINATION REFLECTED AN IMPROPER ANALYSIS OF THE TOTALITY OF THE CIRCUMSTANCES.

The Supreme Court held in *Mapp v. Ohio,* that "[t]he most important constitutional privilege [of the Fourth Amendment] is the exclusion of evidence which an accused had been forced to give by reason of the unlawful seizure." 367 U.S. 643, 686 at 656 (1961). Thus, if a warrant is invalid for lack of probable cause, ordinarily any search or seizure conducted pursuant to the warrant is also invalid and the resulting evidence may be excluded. *Id*. However, a "good faith exception" to this exclusionary rule was created where, if a warrant is held invalid due to the mistake of a judge or magistrate, but is reasonably relied upon by the police and executed in good faith, evidence secured with the warrant may still be admissible and used against a defendant. *U.S.v. Leon*, 468 U.S. 897 (1984). Yet, just as "good faith" is an exception to the exclusionary rule, the *Leon* court created three exceptions to the "good faith" rule, including that a warrant may not be held valid where the supporting affidavit fails to provide the magistrate, "with a substantial basis for determining the existence of probable cause." Id.; *Illinois v. Gates*, 462 U.S. at 239. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *See Aguilar v. Texas,* 378 U.S. at 114-115; *Giordenello v. United States*, 357 U.S. 480; *Nathanson v. United States*, 290 U.S. 41. In the event that a warrant is issued on an insufficient affidavit, the court may find that warrant was invalid because "the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances" *Illinois v. Gates*, 462 U.S. at 238, 239. In this case, the affidavit in support of the search warrants was lacking in the required indicia of probable cause and the *Leon* exception is inapplicable.

D. THE DEFENDANT IS ENTITLED TO SUPPRESSION OF THE FRUITS OF THE SEARCH, INCLUDING HIS ADMISSIONS REGARDING THE PRESENCE AND LOCATION OF DRUGS IN HIS VEHICLE AND ANY TESTIMONY REGARDING HIS EFFORTS TO ASSIST POLICE DURING THE SEARCH OF THE 1998 DODGE DURANGO.

Where evidence is derived from an invalid search, the evidence may be suppressed in order that the court not be made party to lawless invasions of Constitutional rights. *See Leon*, 468 U.S. at 908. Furthermore, evidence obtained pursuant to an unlawful search or seizure has to be excluded under the fruit of the poisonous tree doctrine. *Wong Sun v. United States*, 371 U.S. 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). "When applied, the 'fruit of the poisonous tree' doctrine operates to bar not only evidence directly obtained, but also evidence derivatively gained as a result of information learned or leads obtained during an unlawful search of seizure." *Id.* The United States Supreme Court has refused to adopt a "but for" rule, making inadmissible any and all evidence which comes to light through a chain of events beginning with an illegal stop or arrest. *See United States v. Green*, 111 F.3d 515, 520 (7th Cir. 1997) (citing *Wong Sun*, 371 U.S. at 487-88 (1963)), *cert. denied.* Instead, the Court stated, "the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* Evidence may be purged of the primary taint if the causal connection between the illegal police conduct and the procurement of the evidence is "so attenuated as to dissipate the taint of the illegal action." *Id.* at 521.

The three factors for consideration in determining whether the causal chain is sufficiently attenuated are: "(1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Id.* (citing *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416 (1975)). The crucial consideration in the third factor is whether the evidence came from "the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id*. (quoting *Wong Sun*, 371 U.S. at 488). Here, any alleged consent by Mr. Guzman to search the vehicle or cooperation to locate and open the hide is the direct product of the invalid search warrant and is not sufficiently attenuated.

II. ALL EVIDENCE SEIZED FROM 74 LEONARD JENARD DRIVE SHOULD BE SUPPRESSED SINCE THE SEARCH WARRANT AFFIDAVIT FAILS TO CONTAIN PROBABLE CAUSE TO JUSTIFY THE SEARCH .

To determine the validity of a search warrant, the Court first examines whether the supporting affidavit, as stated, establishes probable cause. See *United States v. Williams*, 3 F.3d 69, 74 (3d Cir.1993). In determining whether the warrant is supported by probable cause, the court will "review the sufficiency of the affidavit upon which a warrant is issued by looking at the totality of the circumstances and simply ensuring 'that the magistrate had a substantial basis for concluding that probable cause existed." *Illinois v. Gates*, 462 U.S. 213. Whether a search warrant is supported by probable cause is determined under the totality of circumstances and exists if, “given all the circumstances set forth in the affidavit ... including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.* at 214. Probable cause may be based on a police officer's observations or experience, *United States v. Jenkins*, 901 F.2d 1075, 1080-81 (11th Cir.1990), or information from a reliable, known informant or information from an independent source that can be independently corroborated. *United States v. Stiver*, 9 F.3d 298, 300-01 (3d Cir.1993).

Here, the affidavit contains no reliable information to establish a fair probability that drug activity was ongoing at 74 Leonard Jenard Drive, Pawtucket, Rhode Island. In fact, the affidavit is clear that confidential informants had informed law enforcement of a “stash” house at 3 Flora Dive. in Providence. The affidavit makes no claim of drugs being stored at 74 Leonard Jenard Drive or of law enforcement observing any suspects making frequent, short stops at that address. 74 Leonard Jenard Drive is described as Mr. Guzman’s residence where a “controlled buy” is described as having taken place between Mr. Guzman and an unidentified, unqualified confidential informant.

“Probable cause to search cannot be based on stale information that no longer suggests that the items sought will be found in the place to be searched." *United States v. Snow*, 919 F.2d 1458, 1459 (10th Cir. 1990). "The determination of staleness, however, does not depend on simply the number of days that have elapsed between the facts relied on and the issuance of the warrant; instead, whether the information is too stale to establish probable cause depends on the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." *Id.* at 1460 (internal quotations omitted). Some courts have held, in the case of stale information that more recent activity in the affidavit may refresh the older information. *See e.g.*

United States v. Greene, 250 F.3d 471, 481 (6th Cir. 2001) (holding that twenty-three month old information in an affidavit was refreshed by subsequent corroboration from an informant); *United States v. Ozar*, 50 F.3d 1440, 1446-47 (8th Cir. 1995)(probable cause may be found where recent information corroborates otherwise stale information); *United States v. Bucuvalas*, 970 F.2d 937, 940 (1st Cir. 1992) ("Staleness does not undermine the probable cause determination if the affidavit contains information that updates, substantiates, or corroborates the stale material."), abrogated on other grounds by *Cleveland v. United States*, 531 U.S. 12 (2000). Moreover, when the suspected criminal activity is ongoing, the problem of staleness is less of a concern. See *United States v. Tehfe,* 722 F.2d 1114, 1190 (3d Cir.1983) ("When an activity is of a protracted and continuous nature 'the passage of time becomes less significant.' ") (citing *United States v. Harris*, 482 F.2d 1115, 1119 (3d Cir.1973)).

Here the controlled buy contained in the affidavit is stale information. The affidavit offers a 37-day period, from November 1, 2007 - December 7, 2007, during which the buy may have taken place. There is no evidence or claims that 74 Leonard Jenard Drive was ever used as a stash house for cocaine. Since there is no other more recent activity described by the affidavit as taking place at Leonard Jenard Drive, the isolated incident of the controlled buy cannot hope to be refreshed. Similarly, assertions contained in the affidavit about the ongoing drug operation cannot mitigate the problem of staleness, since those assertions which rely almost exclusively on confidential informant's tips, include no indication of the reliability of the informants or their basis of knowledge. Therefore as the affidavit contains no reliable information to support a finding of probable cause to support a search warrant for 74 Leonard Jenard Drive, the warrant is invalid and the search of Mr. Guzman's residence is unreasonable in violation of his 4th Amendment freedom from unreasonable search and seizure.

For the foregoing reasons, the defendant, Rafael Guzman, moves to suppress all evidence obtained as a result of the execution of the December 7, 2007 search warrants.

Respectfully submitted
Rafael Guzman
By his attorney,

/s/ John E. MacDonald

John E. MacDonald, 5368
LAROCHELLE & MACDONALD, INC.
One Turks Head Place, Suite 1440
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CERTIFICATION

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